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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

James Broten, Appellant, vs. Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm, Appellees.	)	Supreme Court No. 20190098 Grand Forks County No. 18-2017-CV-02343

ON APPEAL FROM SUMMARY JUDGMENT ENTERED FEBRUARY 25, 2019 IN FAVOR OF APPELLEES AND ORDER ENTERED MAY 1, 2019 GRANTING COSTS AND DISBURSEMENTS IN FAVOR OF APPELLEES, FROM THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT, GRAND FORKS COUNTY, NORTH DAKOTA, THE HONORABLE STEVEN E. MCCULLOUGH, PRESIDING.

BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

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[¶1] STATEMENT OF THE ISSUES

[¶2] I. The district court erred in granting summary judgment in favor of Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm, based on the applicable statute of limitations, the result of which dismissed James Broten's claim for malpractice.

[¶3] II. The district court erred in its award of costs and disbursements to Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm in an amount of $32,303.05.

[¶4] STATEMENT OF THE CASE

[¶5] This is an appeal arising from the district court's order on motion for summary judgment, entered January 23, 2019, order for judgment and judgment, entered February 25, 2019, order on motion objecting to statement of costs and disbursements, entered May 1, 2019, in favor of Defendants/Appellees Ralph Carter; Carter McDonagh & Sandberg, PLLP; and Carter Law Firm (collectively "***Carter***") and against Plaintiff/Appellant James Broten ("***Broten***").

[¶6] On January 14, 2016, Broten served a summons and complaint on Carter. Appendix of Appellant ("***Appendix***"), at 6-16; Index at # 1-7. Broten alleged legal malpractice against Carter related to Carter's representation of Broten in probate litigation in Barnes County file number 02-2011-CV-00042 from 2011 to 2013. Appendix, at 6. Broten alleged Carter willfully delayed Broten's lawsuit for personal gain, in violation of N.D.C.C. § 27-13-08. Appendix, at 6. Broten alleged Carter's law firms were vicariously liable for Carter's negligence and malpractice. Appendix, at 6.

Carter served an answer on Broten on February 19, 2016. Appendix, at 21; Index # 10-11. The case was filed with the district court on September 7, 2017. Appendix, at 20.

[¶7] In the underlying Barnes County case which led to this malpractice action, Broten was accused by his sisters of breach of fiduciary duty as a personal representative of his father's estate. Appendix, at 42. Carter was Broten's attorney from the beginning of the case in 2011 until April 2013. Carter's representation of Broten is explained in further detail in the Statement of Facts of this brief. On August 15, 2013, after a bench trial, the Barnes County court found Broten breached his fiduciary duty as personal representative of his father's estate. Appendix, at 55. The court reserved its findings of damages until after an evidentiary hearing. The court held an evidentiary hearing on damages on December 20, 2013. On January 21, 2014 the court entered its order for judgment, ordering Broten to pay damages to his sisters in an amount of $1,300,054. Appendix, at 67.

[¶8] Broten twice appealed the order from the underlying court. See, Broten, et al. v. Broten, 2015 ND 127, 863 N.W.2d 902; Broten, et al. v. Broten, 2017 ND 47, 890 N.W.2d 847. The Barnes County court's final order for damages was $985,210.60, entered April 18, 2017.

[¶9] Carter filed a motion for summary judgment and brief in support on May 31, 2018. Index at # 22-44. Carter argued the statute of limitations had passed before Broten served his summons and complaint on Carter. The parties twice stipulated to extend the deadline for Broten to respond to summary judgment until after depositions were taken of Broten and Carter. Index at # 47, 54. Broten filed a response to Carter's

motion for summary judgment on July 31, 2018. Index, at # 65-81. Carter filed a reply brief in support of summary judgment on August 10, 2018. Index at # 85-89.

[¶10] On December 17, 2018 the district court held a hearing on Carter's motion for summary judgment. On January 23, 2019 the district court entered its order granting summary judgment in favor of Carter. Appendix, at 96; Index # 102. The district court found Broten's malpractice claim was barred by the relevant statute of limitations, which must be commenced within two years after the cause of action arises. Appendix, at 96, ¶ 13. To determine when the statute of limitations started running, the district court found Broten knew or should have known of his injury was August 15, 2013, the date the underlying court entered its Findings of Fact, Conclusions of Law, and Order for Judgment. Appendix, at 96, ¶ 21.

[¶11] Along with the judgment, Carter submitted a statement of costs and disbursements on February 25, 2019. Appendix, at 104-106; Index at # 111-112. The notice of entry of judgment was filed on February 26, 2019. Appendix, at 107; Index at # 113. Broten filed an objection arguing the costs were not reasonable. Index at # 115-117. Carter filed a response in support of the costs and disbursements. Index at # 121-130.

[¶12] Broten filed the notice of appeal on April 4, 2019. Appendix, at 120; Index at # 132. The Supreme Court remanded this matter to the district court to determine costs and disbursements. A hearing was held on April 30, 2019. On May 1, 2019 the court issued its order on Carter's costs and disbursements, awarding Carter $32,303.05. Appendix, at 123; Index # 137.

[¶13] **STATEMENT OF THE FACTS**

[¶14] The facts of the malpractice case against Carter must include a detailed explanation of the underlying Barnes County case involving Broten. Olaf Broten, father, and Helen Broten, mother, owned farmland in Barnes County. Olaf's will was written in 1979 by attorney John Moosbrugger. Olaf's will dictated that Helen was to be the personal representative of his estate at the time of his death. In addition, Olaf's will devised the farm home and personal property to Helen and all other property or income be placed in trust at the time of his death. At the time of Olaf's death, Broten obtained waivers for Helen and his sisters, Louise Broten and Linda Schuler, to sign that appointed Broten as personal representative of Helen's estate. Broten was named personal representative of Olaf's estate.

[¶15] Shortly before Olaf's will was made, Broten entered a contract for deed for the farmland with Olaf and Helen wherein Broten agreed to pay $200,000, plus six percent interest spread out over payments. Six of these payments were interest only installments of $12,000 from 1980 to 1986. Twenty of these payments were installments of $17,436 for principal and interest from 1987 until 2006. The total value of the contract for deed was $432,720.

[¶16] In 1980 the contract for deed was orally modified by Broten, Olaf, and Helen. Broten was no longer required to make installment payments as stated in the contract for deed. Instead, Broten paid living expenses for Olaf and Helen for the remainder of their lives and $12,000 per year in interest. Broten made substantial improvements to the farmstead during Olaf's lifetime.

[¶17] Olaf died in 1998. Attorney Moosbrugger advised Broten to get waivers from Helen, Louise, and Linda, signed in 1998 after Olaf's death. At that time, and on the advice of Attorney Moosbrugger, Broten filed for informal probate of Olaf's estate. In 1999, on the advice of Attorney Moosbrugger, Broten conveyed real property, 480 acres of farmland, via a deed of personal representative from Olaf's estate to himself. On the advice of Attorney Moosbrugger, Broten recorded the personal representative's deed. Broten continued to pay Helen's living expenses until her death.

[¶18] Helen died in 2010. Louise Broten and Linda Schuler, Broten's sisters, were named co-personal representatives of Helen's estate. Louise and Linda found out about the personal representative's deed recorded in 1999 and brought a lawsuit against Broten, alleging breach of fiduciary duty by a personal representative, conversion, deceit, and breach of contract. Appendix, at 42. The conversion and deceit claims were later withdrawn. Broten retained Carter to represent and defend him in this lawsuit. At that time Carter was a partner at Carter, McDonagh & Sandberg, PLLP. Carter previously worked in the same law firm as Moosbrugger before Moosbrugger retired.

[¶19] Broten kept meticulous records of income and expenses while operating the farm. Broten had over sixty boxes of records accumulated from the early 1980's until years after Helen's death. Deposition Transcript of James Broten, July 3, 2018 ("Broten Deposition"), 99:25 to 100:5; 109:8 to 109:16, Appendix, at 72. These records included documentation of payments made by Broten to Olaf and Helen during their lifetimes. Id. Louise and Linda made discovery requests during the course of their lawsuit against

Broten. Carter produced records in response, but substantially fewer than what Broten had in his actual possession.

[¶20] During the course of litigation with Louise and Linda, Broten was deposed on November 29, 2011. Carter went to Broten's farm the night before the deposition. At that time Broten showed Carter the sixty boxes of records. Carter agreed that he observed the boxes before Broten's deposition.

> Q: Okay. So the night before the deposition, then, you go and stay with Jim Broten, right?
>
> [Carter]: Yes.
>
> Q: Do you prepare him for his deposition while you're out there?
>
> A: Yes.
>
> Q: What time do you get there that night?
>
> A: It's my recollection I got there in the afternoon.
>
> Q: Did he show you around the property?
>
> A: I don't recall that he did.
>
> Q: You don't recall that?
>
> A: No.
>
> Q: Do you recall him taking you to the shop and showing you some boxes in a couple of rooms?
>
> A: Yes.
>
> Q: Tell me about that.
>
> A: We were reviewing things and I kept saying: Jim, I need evidence. I need evidence. So he said: well, come here. And so we went into the Quonset and in the Quonset there were some stairs leading up to this room. We went up to the room and there were Banker Boxes, or Banker Box size boxes all over the room. And he said: here it is.

> Q: Said, what do you need?
>
> A: Yeah. I said everything that supports your claim.
>
> Q: Okay. That was before his deposition?
>
> A: Yeah.
>
> Q: Okay. So you'd, you were -- well, and I think it will show on video, but your eyes got big. Was it a lot of things?
>
> A: Yes.
>
> Q: What did he tell you was in the boxes?
>
> A: Checks, receipts, bills, anything. And he, he said something to the effect that he keeps everything. That's why there were so many boxes. And everything he needed would be in those boxes.

Deposition Transcript of Ralph Carter, July 3, 2018 ("Carter Deposition"), 159:2 to 161:4, Index at # 68. During Broten's deposition in 2011, Carter acknowledged that Broten was not law trained and did not understand technicalities of the law. Appendix, at 27, Index # 27, 23:11 to 23:16, 41:7 to 41:13.

[¶21] After Broten's deposition in 2011, Louise and Linda's attorney served another discovery request on Broten, through Carter, to obtain the records Broten discussed during his deposition. Carter Deposition, 147:9 to 153:24, Index at # 68. Carter sent a letter to Louise and Linda's attorney explaining that Broten was in the process of obtaining additional documents. Carter Deposition, Exhibit 33, Appendix, at 84, Index # 72. However, Carter did not provide notice to Louise and Linda's attorney about the large number of boxes in Broten's possession. Carter Deposition, 161:19 to 162:19, Index at # 68. The records Broten stated were in his possession were directly related to the

payments he made to his parents during their lifetimes. Appendix, at 27, Index # 27, 11:7 to 11:13; 17:7 to 17:15; 30:10 to 30:20; 33:16 to 34:4; 44:22 to 45:4 (phone bill); 45:8 to 46:3 (health insurance); 46:4 to 47:9 (medical bills); 47:10 to 50:1 (utilities and repairs); 50:2 to 53:16 (car payments and insurance); 54:3 to 55:9 (livestock); 55:10 to 57:5 (farm labor); 57:18 to 59:23 (certificates of deposit); 60:23 to 65:10 (money exchanges with Helen); 65:14 to 65:23 (paying Olaf's income taxes); 65:24 to 66:11 (paying property taxes); 66:12 to 67:24 (paying government farming contracts); Appendix, at 27. Carter was aware of the records in Broten's possession yet failed to answer the discovery requests or timely produce additional documents. Carter Deposition, 147:24 to 148:19; 149:2 to 150:17; 165:23 to 166:3; Index at # 68.

[¶22] After several continuances of the bench trial, the lawsuit was set to go to trial on September 10, 2012. On that day the parties appeared for trial. Carter disclosed that he intended to introduce documents as evidence at trial not previously disclosed to Louise and Linda's attorney despite pretrial discovery requests that asked for the same. Appendix, at 52, Index # 36. The first time Carter looked through Broten's boxes was the night before the trial. Broten Deposition, 165:20 to 166:9, Appendix, at 75; Carter Deposition, 163:22 to 164:9, Index at # 68. The court granted the continuance and moved the trial to December 5-6, 2012. The court issued an order that Broten and Carter were to turn over all documents to be used at trial by September 28, 2012. Appendix, at 52, Index # 36.

[¶23] Broten made numerous attempts to contact Carter during the course of litigation about delivering the documents in the boxes to Carter. See e.g., Carter

Deposition Exhibit 73, Email from Jim Broten to Ralph Carter, May 15, 2012 ("Ralph: I've tried that number to [sic] I think I have to [sic] much to fax. Give me a call please."); Appendix, at 85; Carter Deposition Exhibit 74, Email from Jim Broten to Ralph Carter, September 24, 2012 ("Ralph; Will the e-mails sent to you provide enough information or do you want more? These give an example of what I did. . . . Please advise."); Appendix, at 87; Carter Deposition Exhibit 75, Email from Jim Broten to Ralph Carter, September 25, 2012 ("Ralph: I still haven't heard from you. Is what I'm sending you adequate or do we what [sic] more?"); Appendix, at 88; Carter Deposition Exhibit 77, Email from Jim Broten to Ralph Carter, September 27, 2012 ("Ralph: I hope this is what we need it is a little late to add more. Not very professional. Marilyn has all on pd drive if you need it."); Appendix, at 89; Carter Deposition Exhibit 80, Email from Jim Broten to Ralph Carter, November 13, 2012 ("Ralph; I haven't heard from you. I would think there isn't any depositions this week. Were you going to send me something?"); Appendix, at 91; Carter Deposition Exhibit 81, Email from Jim Broten to Ralph Carter, November 20, 2012 ("Ralph; Still havn't [sic] heard from you. Is there something I need to do?"); Appendix, at 92; Carter Deposition Exhibit 82, Email from Jim Broten to Ralph Carter, December 2, 2012 ("Ralph: Are we on for this week?"); Appendix, at 93; Carter Deposition Exhibit 83, Email from Jim Broten to Ralph Carter, January 7, 2013 ("Ralph; How are you doing? I haven't heard from you. Hope everything is fine. Have you heard anything about the trial or what is going on?"); Appendix, at 94.

[¶24] In October 2012, Louise and Linda's attorney filed a motion for summary judgment. The judge did not rule on the motion before the December 2012 trial.

However, that trial did not occur. Carter called the clerk of court the night before trial and stated he wouldn't be able to attend due to health reasons. After this time, the case was reassigned to another judge. In February 2013 Carter signed a response to the motion for summary judgment that was authored by attorneys at the Serkland Law Firm. Broten signed an affidavit in support of his position to overcome summary judgment. In March 2013 Carter formally removed himself from Broten's case due to health reasons.

[¶25] The Conmy Feste law firm was substituted as Broten's counsel in April 2013. Broten's new attorneys had to bring themselves up to speed on the file and prepare for a summary judgment hearing by April 19, 2013. Ultimately the court denied Louise and Linda's motion for summary judgment. The trial court permitted Broten to supplement discovery, but only gave him and his attorneys two weeks to do so. A bench trial was held June 17-18, 2013. Broten's new attorneys were only able to offer a small sample of Broten's records as evidence at trial.

[¶26] On August 15, 2013, the trial court entered its findings of fact, conclusions of law, and order. Appendix, at 55, Index # 40. The court found Broten breached his fiduciary duty as personal representative of his father's estate. The court reserved its findings of damages until after an evidentiary hearing. The court held an evidentiary hearing on damages on December 20, 2013. On January 21, 2014 the court entered its order for judgment, ordering Broten to pay damages to his sisters in an amount of $1,300,054. Appendix, at 67. After two successful appeals, Broten's damages were reduced to $985,210.60.

[¶27] JURISDICTION

[¶28] The Supreme Court has jurisdiction over this matter under N.D. Const. Art. VI, §§ 2 and 6, and N.D.C.C. §§ 28-27-01 and 28-27-02.

[¶29] STANDARD OF REVIEW

[¶30] The Supreme Court's standard of review for summary judgment is well established:

> In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving part to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

THR Minerals, LLC v. Robinson, 2017 ND 78, ¶ 6, 892 N.W.2d 193.

[¶31] A trial court's decision on fees and costs will not be overturned on appeal absent an abuse of discretion. Lemer v. Campbell, 1999 ND 223, ¶ 6, 602 N.W.2d 686. "A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner." Id.

[¶32] REQUEST FOR ORAL ARGUMENT

[¶33] Oral argument will be helpful to the Court in this matter. This case involves two lawsuits: the underlying Barnes County case wherein Broten incurred damages and the current malpractice case alleging Carter's legal malpractice. The district court dismissed Broten's claim based on the applicable statute of limitations that reasonable persons could only draw one conclusion as to when Broten was injured by

Carter's malpractice. The statute of limitations is affected by two separate orders in the underlying Barnes County case, one issued August 15, 2013 and the other issued January 21, 2014. This request is made under N.D.R.App.P. 28(h).

[¶34] **ARGUMENT**

[¶35] **I. The District Court Erred in Granting Summary Judgment in Favor of Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm, Based on the Applicable Statute of Limitations, the Result of Which Dismissed James Broten's Claim for Malpractice.**

[¶36] **A. Summary judgment standard.**

[¶37] Summary judgment under N.D.R.Civ.P. 56 is a procedural device that promptly and expeditiously disposes of an action "without a trial if either party is entitled to judgment as a matter of law and no dispute exists as to either the material facts or the reasonable inferences to be drawn from undisputed facts, or resolving the factual disputes will not alter the result." Skjervem v. Minot State University, 2003 ND 52, ¶ 4, 658 N.W.2d 750. The party seeking summary judgment has the burden of showing no genuine issues of material fact exist and entitlement to judgment as a matter of law. Capps v. Welflen, 2014 ND 201, ¶ 7, 855 N.W.2d 637. When considering a motion for summary judgment, a court "must view the evidence in the light most favorable to the party opposing the motion, who must be given the benefit of all favorable inferences which can reasonably be drawn from the evidence." Skjervem, 2003 ND 52, ¶ 4, 658 N.W.2d 750.

[¶38] The court may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences drawn therefrom to determine whether summary judgment is appropriate. Black v. Abex Corp., 1999 ND 236, ¶ 23, 603 N.W.2d 182. The party

bringing the motion for summary judgment has the burden of showing there are no genuine issues of material fact. Id. The party opposing the motion must present competent admissible evidence that raises an issue of material fact. Id. "Summary judgment is appropriate against a party who fails to establish the existence of a factual dispute on an essential element of [its] claim and on which [it] will bear the burden of proof at trial." Id.

[¶39] **B. Elements of legal malpractice.**

[¶40] There is no dispute an attorney-client relationship existed between Carter and Broten or that Carter owed a duty to properly represent Broten.

> The elements of a legal malpractice action for professional negligence are the existence of an attorney-client relationship, a duty by the attorney to the client, a breach of that duty by the attorney, and damages to the client proximately caused by the breach of that duty.

Larson v. Norkot Mfg., Inc., 2001 ND 103, ¶ 9, 627 N.W.2d 103 (citing Dan Nelson Construction, Inc. v. Nodland & Dickson, 2000 ND 61, ¶ 14, 608 N.W.2d 267).

[¶41] Broten presented the district court with sufficient evidence to overcome summary judgment on the case-within-a-case doctrine. "[This] doctrine applies to alleged negligent-conducted litigation and requires that, but for the attorney's alleged negligence, the litigation would have terminated in a result more favorable for the client." Larson, 2001 ND 103, ¶ 9, 627 N.W.2d 103 (internal citation omitted). The district court determined summary judgment was not appropriate for the case-within-a-case analysis of whether Broten would have prevailed in the underlying lawsuit brought by his sisters. Appendix, at 67.

[¶42] **C. Broten's claim was made within the applicable statute of limitations.**

[¶43] An action for recovery of damages from malpractice must be commenced within two years after relief has accrued. N.D.C.C. § 28-01-18(3). A malpractice action against attorneys must be brought within the two-year statute of limitations under N.D.C.C. § 28-01-18(3). Larson I, 2001 ND 103, ¶ 9, 627 N.W.2d 103 (citing Binstock v. Tschider, 374 N.W.2d 81, 84 (N.D. 1985)). "A cause of action for legal malpractice does not accrue, and the statute of limitations does not commence to run, until the client has incurred some damage." Wall v. Lewis, 366 N.W.2d 471, 473 (N.D. 1985). North Dakota has adopted the discovery rule for legal malpractice actions. The discovery rule "tolls the statute of limitations in malpractice actions until the plaintiff knows, or with reasonable diligence should know, of the injury, its cause, and the defendant's possible negligence." Larson, 2001 ND 103, ¶ 9, 627 N.W.2d 103 (internal citation omitted). "The purpose of the discovery rule is to prevent the injustice of barring a claim before the plaintiff could reasonably be aware of its existence." Wall v. Lewis, 393 N.W.2d 758, 761 (N.D. 1986). In applying the discovery rule, the district court must focus on whether Broten was aware of facts that would cause a reasonable person to believe a potential claim for malpractice existed. Larson, 2001 ND 103, ¶ 10, 627 N.W.2d 103 (quoting Wall, 393 N.W.2d at 761). Broten need not be subjectively convinced that he was injured by Carter's malpractice. Id.

[¶44] "A malpractice plaintiff's knowledge is ordinarily a question of fact, and summary judgment is rarely appropriate on the issue of when the plaintiff should have

discovered there was a potential malpractice claim." Duncklee v. Wills, 542 N.W.2d 739, 742 (N.D. 1996). The plaintiff's knowledge is a question of law only when reasonable minds could draw but one conclusion of when the plaintiff should have enough knowledge to be on notice of a potential claim. Larson, 2001 ND 103, ¶ 10, 627 N.W.2d 386.

[¶45] In this case, Broten would not know of his injury due to Carter's malpractice until a judgment is entered against him on January 21, 2014. See, e.g., Finch v. Backes, 491 N.W.2d 705 (N.D. 1992) (malpractice action against attorney is tolled until underlying case reaches finality). Until that time, Broten's knowledge of any potential injury would not be enough to place him on notice of a potential claim against Carter. Reasonable minds could not draw but one conclusion that Broten was injured as of August 15, 2013 because the Barnes County court's findings indicated that Broten was entitled to offsets for substantial improvements. Even after the judge ruled that Broten had breached his fiduciary duty as personal representative, the opportunity to reduce or offset damages was still at hand until actual damages were determined at a later date. This included an evidentiary hearing in December 2013 to prove damages or offsets. Any claim that Broten was injured before the judgment was entered has the benefit of hindsight, but in reality Broten did not suffer an injury until the judge's opinion and order for judgment was entered January 21, 2014.

[¶46] Statute of limitations claims are heavily fact-based and dependent not on when the actual event of malpractice occurred, but rather when the client should have known that malpractice occurred. See, e.g., Larson, 2001 ND 103, ¶¶ 11-12, 627 N.W.2d

386 (statute of limitations triggered when client was sued for breach of contract, not the date when the contracts were signed); Jacobsen v. Haugen, 529 N.W.2d 882, 885 (N.D. 1995) (statute of limitations triggered when judgment was entered against client).

[¶47] Carter argued, and the district court agreed, that in using an objective standard, Broten should have been aware of Carter's malpractice well before judgment was entered. Broten, however, was convinced he would win the lawsuit because he had all the records showing an oral modification of the contract for deed.

> Q: . . . I'm aware that the judge basically determined that he wasn't real happy that there was a trial date, but do the parties, is there any negotiations, a settlement that does take place?
>
> A: Well, Ralph, we were trying to do some.
>
> Q: Yeah.
>
> A: Yeah, I wasn't very anxious to. I was so certain that --
>
> Q: That you were going to win?
>
> A: Well, I could have had some papers to prove it.

Broten Deposition, 115:6 to 115:18; see also id., 149:18 ("I never imagined that I'd lose."). Appendix, at 77, 78. Broten also testified he didn't realize the amount of judgment his sisters could obtain against him.

> Q: Yeah. And you had -- but you were a very busy man being sued for a million dollars.
>
> A: I didn't, I didn't realize it would be even close to that much, to be honest with you.

Broten was adamant that if the Conmy Feste firm had time to adequately prepare for the trial, Broten would have prevailed.

Q: You hold Ralph totally responsible for having to pay, that you had to pay all of this judgment, don't you, he's totally responsible? Is that your position?

A: My feeling would be if he would have went, did the work that these people had done, or if Mr. Murch would have had the time to do the work, I would have easily --

Q: Easily won?

A: Won the case. What?

Q: Easily won the case?

A: Yeah. . . .

Broten Deposition, 154:21 to 155:8.

[¶48] Broten cannot maintain an legal malpractice claim against Carter unless he satisfies each essential element, one of which is "damages to the client proximately caused by the breach of [the attorney's] duty." Larson I, 2001 ND 103, ¶ 9, 627 N.W.2d 103. Broten was not "damaged" until the Barnes County court entered its memorandum opinion on January 21, 2014 assessing damages against Broten in excess of $1,000,000. The district court's reliance on the August 15, 2013 findings is in error because the Barnes County court still needed to hold a subsequent evidentiary hearing to determine damages. No language in the August 15, 2013 findings foretells that Broten will be assessed any damages for his breach of fiduciary duty. The findings read:

> [¶49] James has made *substantial improvements* on the family farmstead, and is *entitled to compensation or an offset for the value of those improvements* in the division and distribution of Olaf and Helen Broten's estate among the heirs.
>
> . . .
>
> [¶51] A further hearing shall be set to determine the current state of the title to the Land, *the measure of damages*, and/or other appropriate remedy for the breach of fiduciary obligations by James Broten.

Appendix, at 66. (emphasis added). What is clear from an objective reading of the court's findings is that Broten breached his fiduciary obligations, that the court needed a separate hearing to measure damages, and that Broten was entitled to an offset for his substantial contributions. The language of the court's findings in no way is a signal that a reasonable person would know, or should know, that the court would assess damages against Broten. The court's allowance for an offset of damages is the key language that would toll the statute of limitations until the court has actually ordered damages to be paid by Broten. A reasonable person would believe, based on the court's language of its findings and conclusions, that he had not yet incurred any damages.

[¶49] The statute of limitations does not run until actual damage occurs. "A cause of action for legal malpractice does not accrue, and the statute of limitations does not commence to run, until the client has incurred some damage." Wall, 366 N.W.2d at 473. The damage to Broten occurred when the memorandum opinion and order for judgment was entered against Broten on January 21, 2014. Practically speaking, had the trial judge offset Broten's substantial improvements and not assessed any damages against Broten, then there would be no viable claim for malpractice. It is not until Broten is actually aware of his amount of damages that he, or a reasonable person in his position, should know that Carter's malpractice caused his injury.

[¶50] It is helpful to examine previous cases on legal malpractice to determine the objective standard for the discovery rule. In Wall, a malpractice action was brought by the clients after trust agreements drafted by the attorney, which were designed to prevent the clients from incurring tax liability, caused the clients to incur additional tax

liability from the IRS. Wall, 366 N.W.2d at 472. With regard to actual injury to the clients, the Court found, "actual damage has been incurred not later than when the IRS has imposed a tax assessment thereby *creating an enforceable obligation against the client*." Id., 473 (emphasis added). The clients' injury occurred when the IRS issued its tax deficiency notices, which obligated the clients to pay more in tax liability. Id. This is analogous to Broten's situation. Even though the Barnes County court issued its findings of fact, conclusions of law, and order for judgment on August 15, 2013, the court's findings did not assess damages against Broten. The question of damages, or an *enforceable obligation*, had not yet been determined. The enforceable obligation didn't occur until January 21, 2014 when the court entered its memorandum opinion assessing damages against Broten. The damages assessed were the enforceable obligation, not the determination that Broten had breached his fiduciary duties.

[¶51] The district court relied heavily upon the decision in Binstock. In that case, the attorney, on behalf of the client and a third party, drafted a purchase agreement related to a tract of land. Binstock, 374 N.W.2d at 82. The purchase agreement erroneously included a purchase option for a separate tract of land. Id. These documents were executed in January 1976. Id. The client recognized the attorney's error in September 1976 and brought it to the attorney's attention. Id. The client stated he would not honor the purchase option if the third party exercised it. Id. The Supreme Court found the client knew or should have known of the attorney's malpractice when the client reviewed the purchase agreement in September. Id., 84-85. The Supreme Court found the client knew he incurred damage at that point. Id., 85.

[¶52] The district court relied on this Court's opinion in Riemers v. Omdahl, 2004 ND 188, 687 N.W.2d 445 to support its conclusion that reasonable persons could only reach one conclusion on Broten's case. The issue raised in Riemers was whether an appeal to the Supreme Court tolled the statute of limitations on a claim for legal malpractice until after the appellate process was complete. Id., ¶ 5. The client in this case was injured by a premarital agreement drafted by the attorney that the was later invalidated by the district court during the client's divorce proceeding. Id., ¶ 2. The premarital agreement was drafted in March 1999; the district court's ruling was made May 2001. Id. In October 2013 the client properly served the attorney with a summons and complaint for legal malpractice. Id., ¶ 3. The district court granted summary judgment in favor of the attorney based on the statute of limitations. Id. The Court found that the client's claim against the attorney began to run in June 2001, when the divorce judgment was entered, and no reasonable person would believe that it was any date after this. Id., ¶ 11.

[¶53] The district court's findings cannot be affirmed by stating an objective or reasonable person in Broten's place should have known he suffered damage or injury at the time the Barnes County court entered its conclusion that Broten breached his fiduciary duties to his sisters. Had the Barnes County court made a plain statement that it would hold a separate hearing to determine the measure of damages, without giving Broten offsets for substantial improvements, then summary judgment may be appropriate. But the Barnes County court also made the statement that Broten was entitled to an offset of damages based on his substantial improvements to the farmstead. An objective or

reasonable person would take this language to believe that an offset of damages means any damages for liability of a breach of duty could be greatly minimized or completely offset. The district court's analysis of the discovery rule ignores the Barnes County court's language about offsets. Because this case is decided under the lens of Rule 56 for summary judgment, all reasonable inferences must be given to Broten as the non-moving party. See e.g., Skjervem, 2003 ND 52, ¶ 4, 658 N.W.2d 750 (A court "must view the evidence in the light most favorable to the party opposing the motion, who must be given the benefit of all favorable inferences which can reasonably be drawn from the evidence.")

[¶54] Several North Dakota opinions rely on the California case of Budd v. Nixen, 6 Cal.3d 195, 98 Cal.Rptr. 849, 491 P.2d 433 (1971). The Budd court found that a client has no cause of action against an attorney for legal malpractice if the malpractice does not cause damage. Id., 436. "[U]ntil the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." Id. The statute of limitations does not run until some damage has occurred. Id. (citing Prosser, Law on Torts (4th ed. 1971), s 30 at p. 144). "The cause of action in tort does not accrue until the client *both* sustains damage, and discovers, or should discover, his cause of action." Budd, 491 P.2d at 438. The client does not need to sustain all or a greater part of his damages, but the client must have suffered some damage due to the attorney's malpractice. Id., 436-37. "Only in the unusual case will the client discover his attorney's negligence without having suffered any consequential damage." Id., 437.

[¶55] Again, an objective view of Broten's case cannot lead reasonable persons to conclude that Broten suffered his damage on August 15, 2013, when the Barnes County court found Broten had breached his fiduciary duty. The court still needed to hold an evidentiary hearing to determine Louise and Linda's damages and Broten's offsets against those damages. Broten would not be aware of damages until the court entered its opinion and order for judgment on January 21, 2014. The district court erred when it granted summary judgment dismissing Broten's claim based on the statute of limitations.

[¶56] **II. The District Court Erred in Its Award of Costs and Disbursements to Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm in an Amount of $32,303.05.**

[¶57] N.D.C.C. § 28-26-06 provides for taxation of necessary disbursements in all proceedings as provided by law. The allowance of disbursements under N.D.C.C. § 28-26-06 lies within the discretion of the trial court. Richter v. Jones, 378 N.W.2d 209, 213 (N.D. 1985). "A party awarded costs and disbursements must submit a detailed, verified statement to the clerk." N.D.R.Civ.P. 54(e)(1).

[¶58] The prevailing party to a lawsuit is generally entitled to costs and disbursements for successfully prosecuting or defending against the claims. Lemer v. Campbell, 1999 ND 223, ¶ 9, 602 N.W.2d 686 (quoting 20 Am.Jur.2d Costs § 12 (1995)). A prevailing party is determined as the successful party on the merits, even if that party recovers no damages. Id. (quoting 20 C.J.S. Costs § 11 (1990)). A determination of costs and disbursements by the trial court will upheld absent an abuse of discretion. Id., ¶ 6.

[¶59] The district court awarded Carter statutory costs of $5.00, court filing fees of $55.00, deposition expenses of $3,182.78, and expert expenses of $29,065.32. Appendix, at 123; Doc ID# 137. Expert witness "fees must be reasonable fees as determined by the Court plus actual expenses." N.D.C.C. § 28-26-06(5). The amount of expert witness fees is within the trial court's discretion. Taghon v. Kuhn, 497 N.W.2d 403, 407 (N.D. 1993); Munch v. City of Mott, 311 N.W.2d 17, 23 (N.D. 1981). It is the trial court's determination whether the witness's testimony should be characterized as an "expert" under N.D.R.Ev. 702. See Buzzell v. Libi, 340 N.W.2d 36, 42-43 (N.D. 1983).

[¶60] The district court should look at a number of factors similar to those used for awarding legal fees to determine whether expert fees are reasonable. Wahl v. Northern Imp. Co., 2011 ND 146, ¶ 18, 800 N.W.2d 700. The Wahl Court explained this approach by examining seven non-exclusive factors to consider when awarding reasonable expert witness fees:

> In determining a 'reasonable' expert witness fee, the court should consider: (1) the common-law area of expertise; (2) education and training that is required to provide expert insight that is sought; (3) prevailing rates of other comparably respected available experts; (4) nature, quality, and complexity of discovery responses provided; (5) the fee actually being charged to the party who retains the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to be of assistance to the court in balancing the interests implicated.

Id. (quoting 98 C.J.S. Witnesses § 86 (2002)).

[¶61] The district court abuses its discretion by awarding expert witness fees without explaining why the fees were reasonable and without an itemized list allowing a party to challenge the reasonableness of specific fees. Id., ¶ 19 (citing Whitmire v. Whitmire, 1999 ND 56, ¶ 15, 591 N.W.2d 126). The Wahl Court determined the

necessary detail of expert witness's billing records required the same proof for the recovery of attorney's fees. Id., ¶ 17. Carter's expert witness fees are excessive.

[¶62] Carter's expert witness fees for Duane Lillehaug and Mark Larson should not be assessed against Broten. Mr. Lillehaug was retained as an expert to discuss whether Carter's actions were reasonable for an attorney or within the rules of professional conduct. Larson was retained to assess Broten's claim for damages against Carter and improvements Broten made to the farmstead in the underlying case (the case-within-a-case analysis). Neither witness's testimony, report, or expertise were relied upon by Carter to prevail in Carter's motion for summary judgment. The experts were not necessary for Carter to prevail on a statute of limitations claim.

[¶63] Expert witness fees should be disallowed when the party who prevails did not rely on or intend to rely on the expert for judgment. In Matter of Estate of Dittus, 497 N.W.2d 415 (N.D. 1993), the prevailing party sought costs and disbursements for fees and expenses of its expert witness for traveling from Boise, Idaho to Fargo for deposition. Id., 420. Even though the trial court gave no reason for denying an award of these costs, the Supreme Court upheld the ruling. Id. The record revealed that the prevailing party likely would not need its expert witness at trial because the non-prevailing party's strategy before trial eliminated the need for an expert witness at trial. Id.

[¶64] The same logic can be applied to Broten's case. Carter never relied upon Mr. Lillehaug's opinion to support the motion for summary judgment based on statute of limitations. Carter would have prevailed on the motion without Mr. Lillehaug's services. The same is true for Mr. Larson. Carter never relied upon Mr. Larson's opinion to

support a statute of limitations argument. Carter would have prevailed on the motion for summary judgment without Mr. Larson's services. The district court even noted there were genuine issues of material fact based on the case-within-a-case analysis. Appendix, at 67, Index at # 41.

[¶65] CONCLUSION

[¶66] Broten's claim for legal malpractice was made within the applicable statute of limitations. Broten was on notice as of January 21, 2014 that Carter's malpractice had caused injury to Broten. Based on the language of the Barnes County court's findings of fact and conclusions of law, dated August 15, 2013, there exists a genuine issue of material fact as to what Broten, or a reasonable person in Broten's position, would have known about potential injury or damages. The district court did not give all reasonable inferences in Broten's favor. Its order granting summary judgment in favor of Carter and dismissing Broten's claim based on the statute of limitations should be set aside.

[¶67] Carter is not entitled to costs related to his expert witnesses. Carter's expert witnesses were not necessary in order for Carter to prevail on a defense of statute of limitations. Broten should not be responsible for these costs.

[¶68] Broten respectfully prays that the Court reverse the district court's order granting summary judgment in favor of Carter and remand this case for further proceedings before the district court. Broten respectfully prays that the Court reverse the district court's award of costs and disbursements to Carter.

[¶69] Dated this 7th day of June, 2019.

/s/ Lee M. Grossman

_____

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[¶70] **CERTIFICATE OF COMPLIANCE**

[¶71] The undersigned, as attorneys representing Appellant, James Broten, and authors the Brief of Appellant, hereby certify that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the number of pages from cover page to certificate of compliance totals 31 and does not exceed 38. This count is automatically calculated by electronic document. The undersigned further certifies the Appellant's appendix complies with Rule 30 of the North Dakota Rules of Appellate Procedure.

[¶72] Dated this 7th day of June, 2019.

/s/ Lee M. Grossman

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

James Broten,	)	
	)	
Appellant,	)	Supreme Court No.
	)	20190098
vs.	)	
	)	
Ralph Carter; Carter, McDonagh & Sandberg, PLLP; and Carter Law Firm,	)	Grand Forks County No.
	)	18-2017-CV-02343
	)	
Appellees.	)	

ON APPEAL FROM SUMMARY JUDGMENT ENTERED FEBRUARY 25, 2019 IN FAVOR OF APPELLEES AND ORDER ENTERED MAY 1, 2019 GRANTING COSTS AND DISBURSEMENTS IN FAVOR OF APPELLEES, FROM THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT, GRAND FORKS COUNTY, NORTH DAKOTA, THE HONORABLE STEVEN E. MCCULLOUGH, PRESIDING.

CERTIFICATE OF SERVICE

[¶1] I, Lee M. Grossman, an attorney licensed in the State of North Dakota, hereby certify that on **June 7, 2019,** the following documents were filed with the North Dakota Supreme Clerk of Court:

1. **Appellee's Brief;**
2. **Appendix; and**
3. **Certificate of Service.**

[¶2] Copies of these documents were served electronically on all separately represented parties at the e-mail addresses listed below:

Ronald McLean
rmclean@serklandlaw.com

Ian McLean
imclean@serklandlaw.com

[¶3] A check payable to the North Dakota Dakota Supreme Court in the amount of $14.50 has been mailed for the excess page fee pursuant to N.D.R.App.P. 25. This service has been made pursuant to N.D.R.App.P. 25 and N.D.R.Ct. 3.5.

[¶4] Dated: June 7, 2019.

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